

1992

State of Utah v. Brian Douglas Phillips : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 920727 IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff and Respondent,

vs.

BRIAN DOUGLAS PHILLIPS,

Defendant and Appellant

BRIEF OF APPELLANT

Case No. 920727-CA

Priority

Priority No. 12

BRIEF OF APPELLANT

Appeal from a final Judgment, Sentence and Commitment from the Fifth Judicial District Court of Iron County, ordering the Defendant/Appellant to serve a term of imprisonment of zero to five (0-5) years for Damaging a Jail, a third degree felony and interference with an arresting officer, a Class B Misdemeanor, to which the Defendant pled guilty pursuant to a plea agreement, the Honorable Robert T. Briathwaite, presiding.

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OF APPEALS

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	BRIEF OF APPELLANT
Plaintiff and Respondent,)	
vs.)	
BRIAN DOUGLAS PHILLIPS,)	Case No. 920727-CA
Defendant and Appellant)	Priority

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IN THE UTAH COURT OF APPEALS

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BRIAN DOUGLAS PHILLIPS,)	Case No. 920727-CA
Defendant and Appellant.)	Priority _____

JURISDICTION OF THE COURT

The jurisdiction of the Court of Appeals is established Utah Code Annotated 78-2a-3(2)(f), (1953, as amended), where this appeal is from a court of record in an criminal case, involving the entry of a guilty plea to a third degree felony count.

NATURE OF THE PROCEEDINGS

This is an appeal from a Judgment, Sentence and Commitment from the Fifth District Court of Iron County, following the Defendant/Appellant's plea of guilty to a Three Degree Felony and a Class B Misdemeanor and after a presentence evaluation was conducted by the Department of Adult Probation and Parole for sentencing.

ISSUES PRESENTED ON APPEAL

The issues presented on appeal are as follows:

A. Did the trial court err in sentencing the Defendant/Appellant by committing him to the Utah State Prison for

a term of zero to five (0-5) years, under the facts and circumstances of this case?

B. Did the trial court abuse its discretion in sentencing the Defendant/Appellant by committing him to prison for zero to five (0-5) years and not allowing for further diagnostic evaluation?

C. Was Defendant/Appellant denied due process and/or equal protection where he was refused the opportunity for further evaluation at the Utah State diagnostic unit?

DETERMINATIVE STATUTES AND/OR RULES

The statutory and regulatory provisions which are believed to be determinative in this matter are the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution; Sections Seven and Nine, Article One, of the Utah State Constitution.

NATURE OF THE CASE

This is an appeal from the Judgment, Sentence and Commitment of Defendant/Appellant for the offenses of Damaging a Jail, a Third Degree Felony, and Interference with Arresting Officer, a Class B Misdemeanor, from the Fifth District Court of Iron County following Defendant/Appellant's plea of guilty, after the Department of Adult Probation and Parole conducted a presentence investigation.

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COURSE OF THE PROCEEDINGS

The Defendant was charged with two Felonies and Four Misdemeanors. Pursuant to a plea agreement, the Defendant/Appellant plead guilty to Damaging a Jail, a Third Degree Felony, and Interference with Arresting Officer, a Class B Misdemeanor. The case was referred to the Department of Adult Probation and Parole who conducted a presentence investigation and submitted a report to the District Court Judge recommending commitment. The Defendant/Appellant was sentenced to serve zero to five (0-5) years in the Utah State Prison and pay a fine in the amount of Five Thousand (\$5,000.00) Dollars. Defendant/Appellant was also ordered to pay restitution in the amount of Forty-Nine Dollars and Ten Cents (\$49.10) to the Fifth District Court.

DISPOSITION AT TRIAL

There was no trial held in this matter. The Defendant/Appellant plead guilty to Damaging a Jail, a Third Degree Felony, and Interference with Arresting Officer, a Class B Misdemeanor on August 28, 1992 and was sentenced to serve a term of incarceration in the Utah State Prison of zero to five (0-5) years and ordered to pay a fine in the amount of Five Thousand (\$5,000.00) Dollars and restitution in the amount of Forty-Nine Dollars and Ten Cents (\$49.10).

STANDARD OF REVIEW

The standard of review in this matter is believed to be one of correctness regarding the Court's findings or "clearly

erroneous" in determining whether or not the court abused its discretion in disallowing the Defendant/Appellant further consideration through a diagnostic evaluation. See State v. Russell, 791 P.2d 188 (Utah 1990); State v. Walker, 743 P.2d 191, 193, (Utah 1987). The sentencing phase of a criminal proceeding is within judicial scrutiny. See State v. Amicone, 689 P.2d 1341, 1342 (Utah 1984).

STATEMENT OF FACTS

On August 18, 1992, the Defendant\Appellant was arrested at a Cedar City Motel on charges of Spouse Assault, Public Intoxication, Interference with a Peace Officer, Disorderly Conduct and Unlawful Possession of a Firearm by a Violent Felon. He was booked, incarcerated and later he set fire to the carpet in his cell, doing less than Fifty (\$50.00) Dollars damage. Pursuant to a plea agreement, the Defendant\Appellant plead guilty to Damaging a Jail, a Third Degree Felony, and Interference with Arresting Officer, a Class B Misdemeanor on August 28, 1992. Both parties agreed to the preparation of presentence investigation report and the same was ordered by the court that day and later completed by the Department of Adult Probation and Parole. The completed report recommended that the Defendant/Appellant be committed. The Defendant/Appellant was sentenced on the 29th day of September, 1992, to serve a term of imprisonment in the Utah State Prison for zero to five (0-5) years and to pay a fine in the amount of Five

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Thousand (\$5,000.00) Dollars and restitution in the amount of Forty-Nine Dollars and Ten Cents (\$49.10).

SUMMARY OF ARGUMENTS

The Defendant/Appellant asserts that the trial court erred and/or abused its discretion in sentencing the Defendant/Appellant to prison and ordering him to pay a fine of Five Thousand (\$5,000.00) Dollars, without affording the Defendant/Appellant the opportunity for further diagnostic evaluation. The Defendant/Appellant asserts that the same denied him due process of law and constitutes cruel and unusual punishment.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO AFFORD DEFENDANT\APPELLANT THE OPPORTUNITY FOR FURTHER EVALUATION AT THE DIAGNOSTIC UNIT OF THE STATE OF UTAH.

In the instant case, the Department of Adult Probation and Parole prepared a presentence report with regard to the Defendant/Appellant. Much of the information contained therein turned out to false and/or inaccurate as set forth through the testimony of Defendant/Appellant and others at the time of sentencing. Through testimony, it was established that inaccuracies in the report accounted for approximately eight (8) demerits, which would have changed the Defendant/Appellant's classification from "poor" to "fair." A one point demerit was made for a juvenile referral which the reporting officer could not

substantiate, but simply assumed resulted in a conviction and was a felony. The Defendant/Appellant had admitted to taking his father's truck and wrecking it. The reporting officer assumed it was a felony. Defendant/Appellant was given three point demerits for absconding from a substance abuse treatment program. Defendant/Appellant's own testimony, which was uncontroverted, established that the Defendant/Appellant left the program to finish out his prison time. Last, the Defendant/Appellant was demerited four points for the use of a firearm, when the only evidence of any firearm was a disassembled and inoperable shotgun laid out on the bed, having nothing to do with any of the offenses.

Reclassifying the Defendant/Appellant to a fair category would have provided the court with the option of sending the Defendant to be evaluated by the diagnostic unit and the same was requested by the Defendant/Appellant at the time of sentencing.

There were, in addition to the inaccuracy which prejudiced the Defendant/Appellant's evaluation, certain mitigating factors which were not taken into account either by the Department of Adult Probation and Parole or by the Court. The two mitigating circumstances were that the "victim" depended upon the Defendant/Appellant for support and sustenance and further did not want the Defendant/Appellant incarcerated. This was made clear from her testimony at the time of sentencing. See (T 5-12). In short, the Defendant/Appellant was not given a fair and proper evaluation and was therefore entitled a further evaluation to be

conducted by the Utah State diagnostic unit and the same should have been referred given the inaccuracies in the report and the existing mitigating circumstances.

POINT NO. 2

DEFENDANT WAS DENIED DUE PROCESS AND/OR EQUAL PROTECTION, HAVING BEEN DENIED THE OPPORTUNITY TO GO THROUGH A NINETY (90) DAY DIAGNOSTIC EVALUATION.

The procedure utilized by the State of Utah in sentencing criminal Defendants rests foremost and fundamentally upon the accuracy and fairness of the presentence investigation. There is not only a fundamental fairness issue that such information be accurate, but that given the procedures utilized in making known such information to the Defendant/Appellant the Defendant is highly prejudiced and in the very sense of the word, disabled in attempting to controvert such inaccuracies, because the Defendant is not able to review the presentence investigation report until minutes before sentencing. In the instant case, the investigator acknowledged errors in the report and refused to consider mitigating circumstances. Moreover, the investigator refused to acknowledge the cooperation of the Defendant/Appellant. In short, the Defendant was denied due process and/or equal protection by reason of an inaccurate and prejudicial report issued through the presentence investigation.

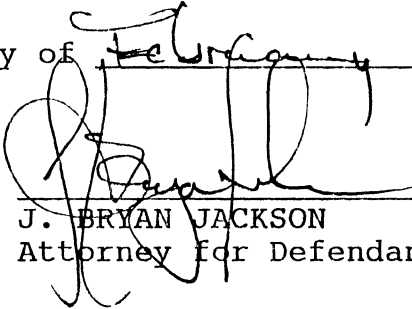
In addition to the Defendant/Appellant's claim of fundamental fairness, the facts and circumstances of this case, strongly suggest that the punishment is much more severe than the

crime. The Defendant/Appellant gets intoxicated, has an argument with his girlfriend and slaps her, struggles with an officer trying to arrest him, the booking officers fail to notice his cigarette lighter and he burns a small hole in the carpet in the jail. Defendant contends that to make him go to prison for five years and pay a fine in the amount of Five Thousand (\$5,000.00) Dollars, when the total damage done to the facility was less than Fifty (\$50.00) Dollars, constitutes cruel and unusual punishment.

CONCLUSION

For those reasons set forth above the Defendant/Appellant respectfully requests the Court of Appeals to reverse and remand the trial court's determination and order that the Defendant/Appellant be afforded the opportunity for further assessment and evaluation.

DATED this 21st day of February, 1995.



J. BRYAN JACKSON
Attorney for Defendant/Appellant

A D D E N D U M

Photocopies of Constitutions and Statutes as outlined
in the Table of Authorities

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VII

[Trial by jury in civil cases.]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

[Bail — Punishment.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

COLLATERAL REFERENCES

Utah Law Review — The Mootness Question in Habeas Corpus Proceedings Where Petitioner Is Released Prior to Final Adjudication, 1969 Utah L. Rev. 265

Habeas Corpus and the In-Service Conscientious Objector, 1969 Utah L. Rev. 328.

Post-Conviction Procedure Act: Limitation on Habeas Corpus?, 1969 Utah L. Rev. 595.
Am. Jur. 2d. — 39 Am. Jur. 2d Habeas Corpus §§ 5 to 7.

C.J.S. — 16A CJS Constitutional Law § 472 et seq.; 39 CJS Habeas Corpus § 5

A.L.R. — Anticipatory relief in federal courts against state criminal prosecutions growing out of civil rights activities, 8 A L R 3d 301.

Key Numbers. — Constitutional Law ⇐ 83(1), 121 to 123.

Sec. 6. [Right to bear arms.]

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

History: Const. 1896; L. 1984 (2nd S.S.), S.J.R. 3.

Compiler's Notes. — Laws 1983, Senate

Joint Resolution No. 2, proposing to amend this section, was repealed by Senate Joint Resolution No. 3, Laws 1984 (2nd S.S.), § 2

NOTES TO DECISIONS

ANALYSIS

Prospective application
Regulation of right to bear arms

Prospective application.

The amendment to this provision by Laws 1984 (2nd S.S.), Senate Joint Resolution No. 3 is to be given prospective application only. State v. Wacek, 703 P 2d 296 (Utah 1985)

Regulation of right to bear arms.

This section gives sufficient authority for the legislature to forbid the possession of dangerous weapons by those who are not citizens, or who have been convicted of crimes, or who are addicted to drugs, or who are mentally incompetent State v. Beorchia, 530 P 2d 813 (Utah 1974).

COLLATERAL REFERENCES

Utah Law Review. — The Individual Right to Bear Arms: An Illusory Public Pacifier?, 1986 Utah L. Rev. 751.

Am. Jur. 2d. — 79 Am. Jur. 2d Weapons and Firearms § 4

C.J.S. — 16A CJS Constitutional Law § 511; 94 CJS Weapons § 2

A.L.R. — Gun control laws, validity and construction of, 28 A L R 3d 845

Validity of statute proscribing possession or carrying of knife, 47 A L R 4th 651

Key Numbers. — Constitutional Law ⇐ 82, Weapons ⇐ 1, 3, 6 et seq

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

History: Const. 1896.

Cross-References. — Eminent domain generally, § 78-34-1 et seq

COLLATERAL REFERENCES

1 Law Review. — Comment, *Roll v. The Right to Bail in Capital Cases Affman v. Georgia*, 1974 Utah L. Rev. 421.
nt Developments in Utah Law — Legislative Enactments — Criminal Law, 1989 L. Rev. 349.

Am. Jur. 2d. — 8 Am. Jur. 2d Bail and Recognizance § 23 et seq.

C.J.S. — 8 C.J.S. Bail § 4 et seq.

A.L.R. — Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385.

Key Numbers. — Bail ⇌ 3, 42, 52.

9. [Excessive bail and fines — Cruel punishments.]

cessive bail shall not be required; excessive fines shall not be imposed; shall cruel and unusual punishments be inflicted. Persons arrested or isoned shall not be treated with unnecessary rigor.

tory: Const. 1896.

NOTES TO DECISIONS

ANALYSIS

and unusual punishment.
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cific offenses.

aggravated sexual assault.

manslaughter.

sodomy on child.

excessive fines.

ile proceedings.

dine examination.

l and unusual punishment.

mer statute providing for sterilization of al defectives under the restrictions in prescribed was not "cruel and unusual punishment" within the meaning of this section. *Davis v. Walton*, 74 Utah 80, 276 P. 921 (1921).

was not cruel and unusual punishment for als to return to Utah for parole violation defendant who had been granted a parole at he could go to the Mayo Clinic for surgery. *Chapman v. Graham*, 2 Utah 2d 156, 270 P.2d 821 (1954).

ie cruel and unusual punishment provi- s of the state and federal constitutions do prevent the state from incarcerating a de- ant for a term longer than the time re- ed to complete the state prison's sex of- ers program. *State v. Bishop*, 717 P.2d 261 (Utah 1986).

death penalty.

ie death penalty as applied under the Utah utory scheme is in accordance with the re- ements of the state and federal constitu- s. *State v. Gardner*, 789 P.2d 273 (Utah Ct. App. 1990).

—Not found.

Concurrent 15-year minimum mandatory sentences for aggravated kidnapping and ag- gravated sexual assault were not unnecessar- ily rigorous, as imposed on defendant who com- mitted crimes as a juvenile but was prosecuted as an adult, where ample aggravating factors were present. *State v. Russell*, 132 Utah Adv. Rep. 14 (1990).

—Specific offenses.

—Aggravated sexual assault.

Imposition of the minimum mandatory sen- tence of five years to life upon defendant's con- viction of aggravated sexual assault did not vi- olate the state constitution's prohibition against cruel and unusual punishment. *State v. Cude*, 784 P.2d 1197 (Utah 1989).

—Manslaughter.

Sentencing of defendant to an indeterminate prison term of from one to fifteen years upon his guilty plea to manslaughter was not cruel and unusual punishment where the offense in- volved the brutal killing of a one-month-old infant. *State v. Hanson*, 627 P.2d 53 (Utah 1981).

—Sodomy on child.

The defendant's sentence (minimum manda- tory five years to maximum life) under the sen- tencing scheme for those convicted of sodomy on a child was not one of those rare cases where the harshness of the sentence was so disproportionate to the nature of the crime that it constituted cruel and unusual punishment. *State v. Bishop*, 717 P.2d 261 (Utah 1986).

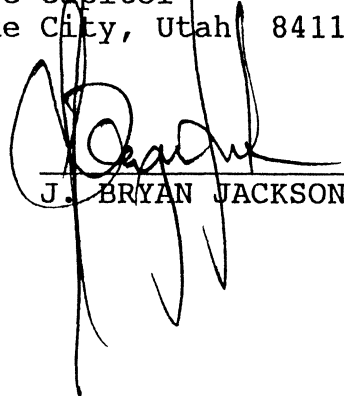
Imposition of a 15-year minimum mandatory sentence for sodomy on a child was not cruel and unusual punishment, where defendant ad- mitted sexually abusing his niece on several

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of
the foregoing, BRIEF OF APPELLANT, postage pre-paid thereon, this
8th day of February, 19 93, to the following:

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